IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 19/01/2004

CORAM

THE HONOURABLE MR.JUSTICE V.KANAGARAJ

SECOND APPEAL NO. 312 of 1985

Chockalinga Vettar .. Appellant

-Vs-

1. Dhanushkodi Konar(died)
2. Alamelu
3. Marimuthu
4. Periyanayaki
5. Lanjammal
6. Arunkutti
7. Pothumani
(RR 2 to 7 brought on record
as LRs of the deceased sole
respondent vide order dt.
28.2.2003 made in CMPs.8832
to 8834/98 by KGPJ) .. Respondents

The above Second Appeal is directed against the judgment and decree dated 26.9.1984 passed in A.S.No.44 of 1983 by the Court of District Judge, Pudukottai, thereby confirming the judgment and decree dated 11.10.1982, passed in O.S.No.33 of 1982 by the Court of Subordinate Judge, Pudukottai.

!For Appellants : Mr.D.Sukumar

^For Respondents : Mr.N.Maninarayanan

:JUDGMENT

The above Second Appeal has been preferred by the defendant in the suit filed by one Dhanushkodi Konar which has been filed against the appellant herein in O.S.No.33 of 1982 in the Court of Subordinate Judge, Pudukottai, praying for a declaration of his title to the suit property and for a permanent injunction restraining the defendant from interfering with his possession and enjoyment of the same and the said suit having been decreed by the trial Court as per its judgment and decree dated 11.10.1982, against which the appellant filed an Appeal Suit No.44 of 1983 on the file of the Court of District Judge, Pudukottai and the said appeal also having come to be dismissed thereby confirming the judgment and decree of the trial Court as per

the judgment dated 26.9.1984, aggrieved, the defendant has come forward to file the above Second Appeal on grounds such as

(i) that the lower appellate Court having held in the connected suit in O.S.No.29/1982, that the appellant is in possession of the entire suit property in Survey No.195, erred in coming to a different conclusion while deciding this suit in O.S.No.32/1982;

(ii) that the lower appellate Court having held in O.S.No.29/1982 that Ex.B4 was not acted upon, erred in holding that the document Ex. A27 which is on line with Ex.B4 would convey the property to the predecessors in title to the respondent and therefore, the orders of the trial Court are vitiated on ground of adopting inconsistent stand in the disposal of the above two suits;

(iii) that the lower appellate Court has failed to appreciate that the entire area is in possession of the defendant as per the Adangal entries and the lower Court having relied on the said Adangal in O. S.No.29/1982 has gone against the same in the present suit;

(iv) that the lower appellate Court ought to have seen that Exs. B37 and B3 being mortgage deeds executed by the appellant would clearly established his title and possession;

(v) that the lower appellate Court and the trial Court as well erred in throwing the onus on the defendant/appellant in proof of partition and that the predecessors in title to the respondent/plaintiff had no right to sell the property;

(vi) that the lower appellate Court having held that Ex.B35 refers to the partition between the sons of Iyasami Vettuvar, erred in confirming the title to the property in favour of the respondent;

(vii) that the trial Court erred in relying upon Ex.A36 produced by the respondent and being a mortgage deed failed to sent for the original to ascertain the endorsement of discharge or cancellation which would have established the falsity of the respondent's case;

(viii) that the lower appellate Court erred in relying upon the evidence of P.W.6. On such grounds and other grounds regarding the facts of the case, the appellant have come forward to file the above Second Appeal and this Court at the time of admission of the above second appeal would frame the following substantial questions of law for determination of the above second appeal viz.,

(i) Whether the courts below are right in coming to inconsistent conclusions in two different suits where common issues are involved?

(ii) Whether the appreciation of evidence in so far as the present suit is concerned by both the courts below is perverse?

2. The plaintiff's case before the trial Court is that the suit property was purchased by him from one Savarimuthu Udayar by means of a registered sale deed dated 23.1.1968, who in turn had purchased the same from one Dhanushkodi Chettiar by a registered sale deed dated 24.1 0.1963, who had taken the suit property in a Court auction sale in Small Causes Suit No.280 of 1953 on the file of the Court of Subordinate Judge, Pudukottai and the properties had been delivered on 7.3.l959 ; that the court delivery interrupts the possession of the judgment debtors and the title of one Ramasamy Chettiar who was a party to the suit; that the said person purchased the suit property from the defendant's stepbrothers on 20.11.1943 and the defendant sold his share on 5.7.1943 measuring 1.75 acres in the suit Survey number along with stepbrothers to one Keeri Vellayan; that the defendant transferred patta for

the whole extent with the help of the village officials, which would show that the plaintiff was in enjoyment of the suit property paying the kist and the patta for the suit land originally stood in patta No.83 and later in patta No.457; that now the patta is changed in the name of the defendant in patta No.239 and under this pretext he claims title to himself much less adverse to the plaintiff; that he has already sold the suit properties to third parties in the year 194 3 and is bound by the sale deed and hence the suit for the reliefs extracted supra.

3. In the written statement filed, the defendant besides generally denying the truth and veracity of the plaint averments and pointing the character of the sale referred to in para 5 of the plaint would also submit that the suit property solely belongs to the defendant having been allotted to him in the partition; that the first wife's sons of his father along with his paternal uncles acted against the interest of the defendant and they wrongly executed the documents assuming that they were entitled to the same; that when the alienees were apprised of the want of title and enjoyment by the paternal uncles and the stepbrothers of this defendant they did not exercise the option of the ownership or enjoyment over the suit property which continues to be in possession and enjoyment of the defendant all along; that in any event the alienations relied on by the plaintiff in para 5 of the plaint would not clothe him or his predecessors in title with any right or title or enjoyment over the property.

4. The defendant would further submit that it is false to state that Dhanushkoti Chettiar got delivery of the property through Court and would assert that the defendant was not at any point of time dispossessed of from the suit property; that even assuming for argument's sake, Dhanushkoti Chettiar obtained any delivery, he would have only got symbolic possession and delivery and he did not workout his remedy by filing a suit for partition and allotment of the suit property purchased by him; that however, the long adverse possession has been created ever-since he became a major in the year 1947; that this defendant and his predecessors were not parties to the proceedings referred to in para 6 of the plaint; that the suit properties fell to his share and his stepbrothers have no right to sell the same; that patta had been transferred in the name of the defendant, taking into consideration of his long possession and enjoyment of the suit property; that the plaintiff has no title or possession over any portion of the suit property and the suit is only speculative in nature with an intention to help the plaintiffs in O.S.No.557 of 1979 on the file of the DMC Pudukottai; that the plaintiffs are not entitled to the reliefs prayed for. On such grounds the defendant would pray to dismiss the suit with costs.

5. The trial Court, based on these pleadings would frame issues for determination of all the questions which are involved in the whole suit and would allow the parties to record their evidence both oral and documentary as a result of which on the part of the plaintiff he would not only examine himself as P.W.1, but also would examine 7 other witness as P.Ws.2 to 8 for oral evidence, besides marking 45 documents as Exs. A1 to A45 for documentary evidence. Likewise, on the part of the defendant he would not only examine himself as D.W.1, but also would examine one Perumal Konar as D.W.2 for oral

evidence in confirmation of his case put up counter to the plaintiff's case and would also mark 38 documents as Exs.B1 to B38 for documentary evidence. Besides these oral and documentary evidence, the trial Court would also mark two documents as Exs.C1 and C2 as court documents.

6. The Trial Court having traced the facts and circumstances of the case in the manner required by law and in appreciation of both oral and documentary evidence placed on record in the context of the facts and circumstances of the case put up by the plaintiff and the defence case placed on record has ultimately decreed the suit as prayed for by the plaintiff, testifying the validity of which the plaintiff has preferred an appeal in A.S.No.44 of 1983 on the file of the Court of District Judge, Pudukottai and the first appellate Court also having traced the facts and circumstances as put-forth by parties before the trial Court and the other aspects relevant for consideration and having framed its own points for determination of the appeal and in appreciation of the facts pleaded and the circumstances brought-forth and the evidence placed on record by the trial Court and in appreciation of the same would concur with the findings of the trial Court in confirmation of its judgment and decree, thus dismissing the appeal preferred by the defendant as a result of which left with no option the defendant in this suit has now come forward to prefer the above second appeal on certain grounds as pleaded in the grounds of appeal.
other witnesses as P.Ws.2 to 8 to a for oral evidence, besides marking 45 documents as Exs.A1 to A45 for documentary evidence. Likewise, on the part of the defendant he would also examine himself as D.W.1 and one Perumal Konaar as D.W.2 for oral evidence in confirmation of his case put up counter to the plaintiff's case and would also mark 38 documents as Exs.B1 to B38 for documentary evidence. Besides these oral and documentary evidence, the trial Court would also mark two Court documents as Exs. C1 and C2.

6. The trial Court having traced the facts and circumstances of the case in the manner required by law and in appreciation of both oral and documentary evidence placed on record in the context of the facts and circumstances of the case put up by the plaintiff and the defence case placed on record, has ultimately decreed the suit as prayed for by the plaintiff, testifying the validity of which the defendant has preferred an appeal in A.S.No.44 of 1983 on the file of the Court of District Judge, Pudukottai and the first appellate Court also having traced the facts and circumstances as put forth by parties before the trial Court and the other aspects relevant for consideration and having framed its own points for determination of the appeal and in appreciation of the facts pleaded and the circumstances brought forth and the evidence placed on record by the trial Court and in appreciation of the same would concur with the findings of the trial Court in confirmation of its judgment and decree, thus dismissing the appeal preferred by the defendant

as a result of which, left with no option, the defendant in the suit has now come forward to prefer the above second appeal on the grounds as pleaded in the grounds of appeal extracted supra.

7. During arguments the learned counsel appearing on behalf of the

appellant besides factually pointing out that the defendant is the appellant in the above Second Appeal filed against the concurrent findings of both the courts below; that it is a suit for declaration and permanent injunction and the suit property is an extent of 2.84 acres of land from out of a large extent of 7.12 acres falling under Survey No.195 of the Village. The learned counsel would also give the facts as narrated in the written statement and would apprise the Court regarding the earlier suit in O.S.No.29 of 1982 thus pointing out the issues and other relevant factors particularly the conclusions arrived at by the trial Court in its judgment. At this juncture, the learned counsel would cite a decision reported in 1979 I MLJ 112 (K.Khaja Muhaideen v. K.Muhaideen Batcha and others) wherein a learned single Judge of this Court has held:

"It seems to me that the Supreme Court Judgment and the Privy Council's observation directly apply to the present case. It cannot be denied that the subject-matter of the two cross-suits in the present case was precisely the same, namely, the conduct of the business of the tailoring mart, although the reliefs claimed in the two suits were, understandably, different, injunction being asked for in the one casse and possession being asked for in the other. This difference, however, in the reliefs asked for, cannot make any difference in the application of the rule of res judicata, since in both the suits the question that was directly and substantially in issue was the same. In these events, the learned Subordinate Judge ought to have held that an appeal against one of the decrees alone would be clearly barred under section 11 of the Code."

The learned counsel would further state that following the trial Court judgment the first appellate Court has also bluntly decided the case in the same manner which is not sustainable in law. On such arguments the learned counsel would pray to allow the above Second Appeal setting aside the judgments and decrees passed by the lower Courts.

8. In reply, the learned counsel appearing0 for the respondent would argue to the effect that under Ex.A23 dated 23.1.1968 an extent of 2 .84 acres have been sold from out of the entire extent of 7 acres in S.No.195; that in turn Savarimuthu Udayar purchased under Ex.A24 and and in turn Dhanushkoti Chettiar purchased by Court auction again under Ex.A25 and in the Execution Proceedings Ramasamy Chettiar is a party and possession had been taken under Ex.A26 which is the delivery receipt dated 7.3.l959 attested by the Village Karnam; that from the date of the plaintiff purchasing the same from Savarimuthu Udayar he is in possession and enjoyment of the suit property paying kist to the Government; that in 1976 the defendant claimed the entire suit property and therefore, the plaintiff filed the suit for declaration and injunction; that there were two different purchasers in same survey number as it could be seen in the discussion held in the trial Court judgment in para 17; that the plaintiff's document Ex.A36 is vital for consideration; that the defendant did not produce anything relevant for consideration; that Exs.A38 to A41 kist receipts would speak volumes to the possession and enjoyment of the suit properties by the plaintiff and even Ex.B1 to B4 sale deeds and the patta standing jointly after 1950 under Ex.B25 would consolidate the case of the plaintiff in not small measure. The learned counsel ultimately pointing out that the Courts below having discussed the facts and circumstances of the case

in length and having applied the norms of law on the evidence placed on record have concurrently held that the plaintif is entitled to the suit property and is in possession and enjoyment of the same and decreed the suit and dismissed the appeal preferred by the defendant. On such arguments the learned counsel would pray to dismiss the above second appeal with costs.

9. In consideration of the facts pleaded, having regard to the materials placed on record and upon hearing the learned counsel for both if the substantial questions of law framed have to be taken up for consideration in order to determine the above second appeal the question regarding the first substantial question of law whether the Courts below are right in coming to inconsistent conclusions in two different suits where common issues are involved as neither been emphasised nor laid stress on the part of the appellant/defendant even though a passing reference has been made in the written statement since neither the trial court framed an issue on this legal point nor the first appellate Court framed a point to the said effect and this appellant has never challenged the same in the appropriate manner then and there since after framing of the issues there was enough time left with prior to the trial and deciding the case and if at all the appellant was aggrieved in any manner regarding the non framing of the issues by the trial Court and non framing of the point to the said effect by the first appellate Court he should have then and there challenged the same in the appropriate manner and therefore, the appellant has no right to agitate the same in the second appeal as the first time. Moreover, in para No.17 of the judgment of the trial Court this issue regarding the earlier suit filed in O.S.No.29 of 1982 has been elaborately discussed and a decision has been arrived at and the same has been accepted by the first appellate Court also as a result of which it cannot be said that the Courts below have arrived at any inconsistent conclusions in two different suits where common issues were involved and it is doubtful whether any issues actually involved in both the said suits and what is the earlier suit for etc., and it is not the issue that could be taken up as the first time in the second appeal and hence this Court is of the view that it is only prudent to conclude that no inconsistent conclusion has been arrived at with the given facts and circumstances and opportunity to the lower Courts thus answering the first substantial question of law against the appellant.

10. Regarding the appreciation of evidence in so far as the preset suit is concerned regarding the second substantial question of law, on a perusal of the judgments and decrees passed by the trial court and the first appellate Court it could be easily found that both the courts below have traced the facts and circumstances as pleaded by parties without even missing the minute points and having framed the issues and points and dealing with the subject in the manner required under law in full appreciation of the evidence both oral and documentary have arrived at a valid decision in a concurrent manner and this Court does not see any place for perversity to crept into those judgments pertaining to the appreciation of evidence and hence this substantial question of law should also be decided only against the appellant and the same is decided accordingly.

11. In short, all the necessary ingredients that are required for deciding the suit and appeal have been properly dealt with by the trial Court

and the first appellate Court as well so as to arrive at the conclusions to decree the suit as prayed for and to confirm the same on appeal and therefore, interference of this Court that is sought to be made in to the well considered and merited jugements and decrees passed by both the Courts below is neither necessary nor called for in the circumstances of the case and hence the following decision:

In result,
(i) the above second appeal does not merit acceptance and becomes liable to be dismissed and is dismissed accordingly;
(ii) the judgment and decree dated 26.9.1984 made in A.S.No.44 of 19 84 by the Court of District Judge, Pudukottai thereby confirming the judgment and decree dated 11.10.1982 made in O.S.No.33 of 1982 by the Court of Subordinate Judge, Pudukottai is hereby confirmed;
(iii) however, in the circumstances of the case, there shall be no order as to costs;
(iv) consequently, C.M.P.No.2445 of 1985 is also dismissed.

Index:Yes
Internet:Yes
gr.
To
1. The District Judge, Pudukottai.
2. The Subordinate Judge, Pudukottai.